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Comment on AOR 2002-13

By Hand Delivery

Lawrence Norton, Esquire
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Advisory Opinion Request 2002-13

Dear Mr. Norton:

I am writing on behalf of Common Cause and Democracy 21 to comment on Advisory Opinion Request 2002-13, regarding rules relating to recounts of federal elections under the Bipartisan Campaign Reform Act of 2002 (BCRA).

Both Common Cause and Democracy 21 have been longstanding proponents of the reforms enacted by Congress in the BCRA. Both organizations have been active participants in the Commission's ongoing rulemaking to implement the BCRA in order to guard against any actions that will undermine the BCRA or open loopholes in the statutory ban on soft money, the centerpiece reform of the BCRA.

In the past, the Commission has viewed a recount as not fully part of the election process to which the recount is related. Instead, the Commission's rules have created a hybrid form of "recount funds" that can be spent for recount activity -- money that must come from federally permissible sources (i.e., corporate and union funds are prohibited, as well as funds from foreign nationals), yet is not subject to federal contribution limits. *See* 11 CFR 100.91, 100.151 (current codification).

The Commission's position here is incorrect, and defies common sense. The view that recounts are not fully and inherently a part of the federal electoral process, and therefore "recount funds" need not be fully subject to the federal campaign finance rules, blinks reality. A candidate's or party's activities relating to a recount in a closely

contested race for federal office are a natural extension of the campaign itself. The same rules that apply to the raising of funds by a candidate or party for campaigning for a federal office should also apply to raising funds for candidate or party activities related to counting – or recounting -- the ballots cast for a federal office. It is all of one piece in a candidate's efforts to win election to a federal office.

Nonetheless, the Commission has taken a bifurcated approach of applying to "recount fund" activities the source prohibitions of 2 U.S.C. 441b (corporations and unions) and 441e (foreign nationals), but not the contribution limits of 441a.

This inconsistent application of the various statutory provisions does not hold up as a matter of law. It wrongly treats recounts for a federal election as not part of a federal election for purposes of a portion of the federal campaign finance laws.

The Commission's position can be explained at all in terms of the statute only if it is understood as a holding that recount activities are "in connection with" a federal election, the statutory standard of sections 441b and 441e, but not "for the purpose of influencing" a federal election, the standard of section 441a. Only this interpretation gives the Commission's bifurcated treatment of this issue in past regulations and advisory opinions any grounding at all in the statute itself.

For present purposes, we stress that the Commission has accordingly long held that election recounts are activities "in connection with" a federal election, and therefore subject to the source prohibitions of section 441b.[1] This understanding -- that recount activities are electoral activities "in connection with" a federal election, and thus regulated as such by the FECA – is correct insofar as it goes, and is central to addressing the questions posed in this AOR as to the application of the BCRA.

The AOR raises multiple questions, but they fall into three clusters: the recount rules applicable to the national parties, to the state parties, and to federal candidates and officeholders. The AOR also raises questions for each cluster in terms of pre-November 6, 2002 activities, and post-November 6 activities. We use this framework to address the basic principles at issue in the advisory opinion request.

A. National Parties. The BCRA allows the national parties to raise non-federal funds until November 6, 2002. After that date, the national parties may not raise any funds for any purpose that do not comply with the contribution limits, source prohibitions and reporting requirements of the Act.

If the national parties have soft money funds on hand as of November 6, they may continue to spend those funds to "pay expenses that were incurred solely in connection

[1] *See also* Explanation and Justification of the Disclosure Regulations, H.R.Doc. 95-44 at 40 (recounts "are related to elections...").

with any...recount....resulting from an election held prior to November 6, 2002." BCRA sec. 402(b)(2)(B)(I)(II). Thus, the national parties can spend excess soft money on hand for recounts arising from the 2002 election. However, this provision would be subject to the Commission's existing recount regulations which prohibit corporate, union or foreign national funds from being spent for recount activities.[2]

For recounts arising out of subsequent elections – beyond the November 5, 2002 election – the national parties cannot raise or spend non-federal funds of any sort for any activity, including recounts. All recount activities would have to be funded by the national parties and their agents out of hard money.

Any entity "directly or indirectly established, financed, maintained or controlled" by a national party is subject to the same rule as applies to the national party. 2 U.S.C. 441i(a)(2). Thus, no entity established or financed by a national party, either before or after November 6, can raise any non-federal funds, nor spend such funds for any purpose, including recount activities, after November 6, other than the spend-down of non-federal funds on hand that were raised prior to November 6 and are spent for recounts arising out of the 2002 election.

B. Federal candidates and officeholders. Under the BCRA, federal candidates and officeholders cannot, after November 6, 2002, raise or spend any non-federal money for any activity "in connection with" a federal election. 2 U.S.C. 441i(e)(1). Since the Commission has long treated recount activities as "in connection with" a federal election (for purposes of applying sections 441b and 441e), federal candidates and officeholders are clearly prohibited by the BCRA from raising or spending non-federal funds, including so-called "recount funds," for recount activities. They may of course raise and spend hard money for such purposes.[3]

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[2] The BCRA transition provision which allows soft money on hand to be spent for recounts arising out of the 2002 election is conditioned by the limitation that such funds may not be used for any "expenditure." Section 402(b)(2)(B)(ii). Because the Commission's regulation treats recount funds as an exemption from the definition of "expenditure" only if corporate and union funds are not used, then any use of corporate or union funds would mean that the recount funding would not qualify for the exemption, and would thus be an "expenditure," and would then fall outside the scope of the BCRA transition rule that permits the use of soft money on hand for 2002 cycle recounts.

[3] The BCRA transition provisions do not apply sections 441i(a) and 441i(b) to recount activities arising out of the 2002 elections, but there is no comparable "grandfather" provision that delays implementation of section 441(e), relating to candidates and officeholders. Thus, post-November 6, 2002, candidates and officeholders are precluded from raising and spending non-federal funds for any purpose "in connection with" a federal election, including recount activities arising from the 2002 election.

The same rule applies to any entity "directly or indirectly established, financed, maintained or controlled" by a federal candidate or officeholder. *Id.* It is impermissible for any such entity to spend non-federal funds for recount activities, which are by definition "in connection with" a federal election. And for the same reason, it is impermissible for a federal candidate or officeholder to raise non-federal funds for an entity that engages in recount activities.[4]

C. State parties. Under the BCRA, state parties must spend either hard money or an allocated mixture of hard money and Levin funds for certain enumerated "federal election activities." 2 U.S.C. 441i(b). But the BCRA's transition provision, section 402(a)(4), provides that the state party provisions of Title I, section 441i(b), "shall not apply with respect to...recounts...resulting from elections held prior to" November 6, 2002.

Thus, the BCRA rules do not apply to state party activities relating to 2002 cycle recounts. State parties for this limited purpose continue to operate under pre-BCRA rules, including the Commission's recount regulation. Thus, for recounts arising out of the 2002 election, state parties can spend funds permitted by the Commission's existing recount regulation (i.e., nonfederal donations by individual but not by corporations, unions or foreign nationals).

For recounts arising in future elections – post-November 5, 2002 – the BCRA provides no broad answer. In each case, it would depend on the nature of the recount activity to be engaged in by the state party, and whether that activity fell within the scope of any of the enumerated "federal election activities" defined in section 441i(b) of the BCRA. If so, the activity would be subject to the generally applicable rules for state party funding of "federal election activity" and would have to be paid for either with hard money, or with an allocated mixture of hard money and Levin funds.

Future state party recount activity that is not a "federal election activity" within the BCRA should be addressed by the Commission in a new rulemaking to ensure that non-federal funds are not used by state parties for recounts involving federal elections. We believe that recount activities for federal elections – which the Commission has always treated as "in connection with" a federal election for purposes of Section 441b – should be funded by hard money. Unlike voter registration or GOTV activities described in section 431(20)(A)(i) and (ii) of the BCRA as "federal election activities" that have an impact on both federal and nonfederal campaigns, recounts relating to a federal election have an impact only on federal elections and are thus more closely analogous to

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[4] This applies as well to any 501(c) entity established by a candidate to engage in recount activities. Under the Commission's implementing regulations, a federal candidate cannot make a solicitation of non-federal funds only for an organization that engages in activities "in connection with" a federal election only if "the organization's principle purpose is not to conduct election activities..." 11 CFR 300.52(a)(2)(i). This would preclude solicitations for entities that engage in recount activities.

subclause (iii) activities – public communications that promote a federal candidate – which must be funded by state parties exclusively with hard money since they affect only federal campaigns.

Again, the rules applying to state parties apply as well to any entity "directly or indirectly established, financed, maintained or controlled" by a state party, whether established prior to or after November 6, 2002. 2 U.S.C. 441i(b)(1).

We appreciate the opportunity to submit these comments. We strongly urge the Commission to apply the BCRA with regard to this AOR in a way that best carries out the language and intent of the legislation to comprehensively ban soft money. The Commission has a responsibility to be particularly careful not to open avenues that would allow parties, candidates and officeholders to continue to deal in non-federal funds for any purpose related to federal elections. To do so would be directly contrary to the language and intent of the BCRA.

Respectfully,

/s/ Donald J. Simon

Donald J. Simon

Copy by hand to:

David Mason, Chairman
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Scott Thomas, Commissioner
Bradley Smith, Commissioner
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Michael Toner, Commissioner
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